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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID RUBALCABA,

Plaintiff and Appellant,

v.

ALBERTSON'S LLC,

Defendant and Appellant.

B278626

B281730

(Los Angeles County
Super. Ct. No. BC528755)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed in part and reversed in part with directions.

Abrolat Law, Nancy L. Abrolat and Shahane A. Martirosyan for Plaintiff and Appellant.

Carothers DiSante & Freudenberger, Leigh A. White, Steven A. Micheli and Nancy N. Lubrano for Defendant and Appellant.

INTRODUCTION

Plaintiff David Rubalcaba (plaintiff) worked as a produce clerk for defendant Albertson's LLC (Albertson's) for 33 years. After he was terminated in 2013, he filed this action alleging, among other things, disability discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code¹, § 12940, subd. (a)), failure to accommodate his disability (§ 12940, subd. (m)(1)), failure to engage in the interactive process (§ 12940, subd. (n)), retaliation (§ 12940, subd. (h)), and intentional infliction of emotional distress (IIED). Plaintiff sought compensatory and punitive damages.

The trial court granted summary adjudication for Albertson's on plaintiff's claims for disability discrimination, failure to accommodate, and punitive damages. The remaining causes of action for failure to engage in the interactive process, retaliation, and IIED, were tried by a jury, which returned a verdict for plaintiff. Post-trial, the trial court awarded plaintiff prevailing party attorney fees.

Albertson's has appealed from the jury verdict and award of attorney fees, and plaintiff has appealed from the grant of summary adjudication. We reverse in significant part, as follows.

Intentional discrimination. FEHA prohibits intentional discrimination on the basis of disability. Because there are triable issues of fact as to intentional discrimination, we reverse the summary adjudication for Albertson's on the intentional discrimination claim.

¹ All subsequent undesignated statutory references are to the Government Code.

Failure to reasonably accommodate. To recover for failure to reasonably accommodate, plaintiff was required to demonstrate that he required an accommodation in order to perform the essential functions of his job. He did not do so; to the contrary, plaintiff's summary judgment evidence demonstrated that plaintiff was able to perform his job without accommodation. We therefore affirm summary adjudication for Albertson's on the cause of action for failure to accommodate.

Punitive damages. There are no triable issues of fact that the employees who made the decision to terminate plaintiff were managing agents. We therefore affirm summary adjudication for Albertson's on the request for punitive damages.

Failure to engage in the interactive process. To recover for failure to engage in the interactive process, plaintiff was required to identify an accommodation Albertson's should have provided him, but failed to do so. Plaintiff did not make the required showing. We therefore direct entry of judgment for Albertson's on the cause of action for failure to engage in the interactive process.

Retaliation. Plaintiff contended he suffered retaliation because he (1) sought an accommodation for his disability, and (2) protested sexual harassment by a co-worker. The first alleged ground was not a proper basis for a retaliation claim during the relevant time period, and the second alleged ground was not supported by substantial evidence. Accordingly, we direct entry of judgment for Albertson's on the retaliation claim.

Intentional infliction of emotional distress. Plaintiff's claim for intentional infliction of emotional distress is based on the same conduct that he alleged gave rise to his FEHA claims. Because we conclude that those claims were not supported by

substantial evidence, plaintiff's intentional infliction of emotional distress claim also fails. We therefore direct entry of judgment for Albertson's on the intentional infliction of emotional distress claim.

Attorney fees and costs. Because we have reversed the judgment for plaintiff, we also reverse the award to plaintiff of prevailing party attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

Albertson's hired plaintiff as a produce clerk in 1980, and promoted him to produce manager two years later. Plaintiff stepped down from the produce manager position in 1991, when his mother suffered a stroke. Plaintiff remained classified as a produce clerk until his termination in 2013, although he filled in as "acting" produce manager at various times.

A. Plaintiff's Pituitary Tumor Diagnosis

In 1992, plaintiff was diagnosed with a pituitary adenoma, a benign tumor on the pituitary gland. In October 1992, plaintiff took a six-month leave of absence to obtain treatment for his tumor, returning to work in March 1993.

In 2001, plaintiff provided his supervisor with two doctor's notes relating to his pituitary tumor. The first stated the tumor would occasionally cause plaintiff to have headaches; the second said that plaintiff should not be required to wear a hat at work. In 2002, plaintiff provided an additional doctor's note stating that he might need surgery for his tumor.

Plaintiff testified that his tumor affected his memory and balance. He therefore kept a notepad in his pocket to write things down so he did not forget them, and he told each of his store managers about his tumor. However, plaintiff's issues with memory and balance were not apparent to his coworkers, who

uniformly testified that they did not observe him to have difficulties with either memory or balance. For example, plaintiff's immediate supervisor, Tavis Grim, testified that during the three or four years he and plaintiff worked together, he never observed plaintiff to have balance or memory issues or to have difficulty with the physical or nonphysical aspects of his job, which included writing orders, breaking down loads, lifting produce boxes, and stocking the shelves. Assistant store manager Ron McInturf similarly said he never had any reason to believe plaintiff's tumor was affecting his job performance, and he never knew plaintiff to have memory problems or to appear to be off-balance. Store manager Randy Johnson testified that he never saw plaintiff exhibit any problems recalling or following directions.

B. Plaintiff's Performance

Plaintiff testified that he loved his job and was an exemplary employee. He said he had an outstanding relationship with his customers and spent a great deal of time ensuring the produce in his department was nicely presented and ready for the customers. Plaintiff also testified that his managers recognized his superior work. For example, plaintiff said he was the acting produce manager in the Moreno Valley store from November 2010 to November 2011, during which time district manager Steve Fujimoto told him he was doing an "outstanding job," and store manager Jim Moore said he could not have done a better job. In November 2011, plaintiff was asked to be the acting produce manager in the Riverside store, which was the second busiest store in the district. During the four months plaintiff served in that position, he said he did not receive any criticisms, and instead "received a lot of compliments" for the "great job" he

was doing. And in June 2013, plaintiff filled in for Tavis Grim as acting produce manager; store manager Randy Johnson gave him a “high five” award for his performance and told plaintiff that “he was real happy with” him.

Albertson’s witnesses similarly testified that plaintiff was an excellent employee. Tavis Grim described plaintiff as a “very good” employee who worked hard and was trustworthy. Ron McInturf similarly testified that plaintiff was a good employee who seemed “very bright” and “on top of things.” And Randy Johnson testified that he never saw plaintiff exhibit any problems with his work performance.

C. Plaintiff’s Participation in Investigations of Tavis Grim

In 2007, plaintiff was present during an incident between his produce supervisor, Tavis Grim, and Elisa Wilson, a produce employee. Wilson had complained to Grim that she could not finish her work before the end of her shift, and Grim told her she should “put [her] head down and suck it up.” Wilson reported the incident to store management, who interviewed plaintiff as a witness to the event. Plaintiff described what he had heard. Subsequently, Grim said he could not believe plaintiff had told management anything, and things were strained between plaintiff and Grim for several weeks. Plaintiff and Grim then resumed having lunch together and texting and calling one another.

In April 2012, plaintiff was present during an incident between Grim and a different produce employee, Lorena Valdivia. When the store manager asked plaintiff to describe what he had observed, plaintiff said Valdivia “was walking out of the produce cooler, and she was carrying a bowl of cut

watermelon. And [Grim] saw her coming out of the produce cooler and . . . he put his arm around her neck and pulled her head down and walked around with her in a circle, walking like this; walking, walking. And she was just, like, trying to get out of it, but she had her hands on that bowl.” Plaintiff told the manager that “ ‘It didn’t seem . . . like, [Grim] was being aggressive toward her. It just seemed like he was telling her, ‘hey, good job,’ and that was his way of doing it.’ ” Later that day, Grim asked plaintiff what he had told the manager, and plaintiff said, “ ‘I told him I saw you put her into a headlock, but you didn’t mean anything by it.’ ” Grim said he had told the manager he had not touched the employee, and then he “shook his head and he just walked away and didn’t talk to me.” Grim was quiet around plaintiff for about three weeks, and then their relationship returned to normal. Grim subsequently told plaintiff he had not been disciplined for the incident.

In June 2013, three female produce employees complained to plaintiff about Grim. Plaintiff relayed the subject of the complaints to his store manager Randy Johnson. Johnson said he already knew about the complaints and was working on them. When plaintiff asked Grim if he had been talked to, Grim said, “No. Nobody said anything to me.”

D. Plaintiff’s 2012 Warning

In November 2012, a clerk named Andrew Wolfe complained about an incident that occurred when plaintiff was off-the-clock and purchasing groceries. Wolfe said he was bagging plaintiff’s groceries when plaintiff became angry, grabbed the back of Wolfe’s neck, jabbed Wolfe in the ribs, and called him a “dumb ass.” The store manager and a loss prevention employee interviewed plaintiff about the incident.

Plaintiff said he did not remember touching Wolfe, and he asked to see the video of the incident. After watching it, plaintiff agreed that the video showed him touching Wolfe in the back, but not jabbing or choking him. Plaintiff said he had a brain tumor that affected his recollection. Plaintiff explained that Wolfe had put his hot fried chicken and ice cream in the same grocery bag, and plaintiff had asked him to separate the hot and cold food. Wolfe argued with plaintiff and asked what difference it made. Plaintiff separated his groceries and then said, “That was dumb stuff Smarten up. We are selling food here.”

Plaintiff was given a written warning about the incident. In relevant part, it said: “As you know, Albertson’s conducted an investigation into allegations that you grabbed the back of the neck of another associate, used profanity and poked him in the ribs. You admitted to, after reviewing video, grabbing the associate’s neck but denied using profanity and poking him. Consider this a last and final written warning for inappropriate behavior. . . . [¶] In the future you must conduct yourself in a professional and businesslike manner at all times and comply with Albertson’s Courtesy, Dignity and Respect policy, non-harassment policy and other policies.” Orally, plaintiff’s manager told him to be sure not to touch employees in the future.

E. Plaintiff’s Termination

In June 2013, Grim told plaintiff that if he saw any unauthorized alcohol displays in the produce department, he should remove them. Plaintiff said Grim pointed out the displays that should be removed and told him to put the beer in the back room and “dump the boxes.” In particular, Grim told plaintiff to remove a “Shock-Top” beer display made up of three wood crates and six-packs of beer.

After Grim left, plaintiff put the beer in one shopping cart and the three wood crates in another. Because plaintiff was planning to move from his residence soon, he decided to take the wood crates home instead of throwing them away. He started to take the crates to his car, but then decided to wait until the end of his shift. When his shift ended, he added three cardboard boxes to the cart with the wood crates and wheeled the cart out the front door.

About a week and a half later, Ron McInturf, the assistant store manager, and B.J. Loyd, a security employee, asked to speak to plaintiff. Loyd asked if plaintiff recalled leaving the store with wood crates a week earlier. Plaintiff said yes. Loyd asked if he had gotten permission to take the crates. Plaintiff said he had been told to take down the display and throw out the crates, so he took the crates home to use for his upcoming move. Plaintiff asked whether Loyd wanted the crates back or wanted him to pay for them. Loyd said no, but he would need plaintiff to write out a statement. Plaintiff did so and then went to lunch. When he returned from lunch, plaintiff was told he was being suspended pending further investigation.

As part of his investigation, Loyd asked Grim whether he had told plaintiff he could take the crates home; Grim said he had not. Grim was not asked whether he had told plaintiff to take down the beer display or to throw away the crates. Grim provided a written statement that said, in full, "I let Dave know that any side stack that was not supost [sic] to be in our department to let management know and remove."

Associate relations representative Carol Hansen talked to Loyd about his investigation, and she reviewed plaintiff's and Grim's written statements. She then recommended to Randy

Johnson, plaintiff's store manager, that plaintiff be terminated. Johnson approved the recommendation, and on July 6, 2013, plaintiff learned he had been terminated.

F. Complaint; Albertson's Motion for Summary Judgment or Summary Adjudication

Plaintiff filed the present action against Albertson's in November 2013.² It alleged causes of action for (1) violations of FEHA; (2) wrongful termination in violation of public policy, (3) Labor Code violations (failure to timely provide copies of employment records and to pay all amounts owing within 24 hours of termination), (4) invasion of privacy, (5) defamation, (6) intentional infliction of emotional distress, (7) violations of the California Family Rights Act (CFRA), and (8) failure to provide copies of all wage and time records. Plaintiff sought compensatory and punitive damages and attorney fees, among other things.

In June 2015, Albertson's moved for summary judgment or, in the alternative, for summary adjudication. Plaintiff opposed the motion. The trial court denied the motion for summary judgment, but granted the motion for summary adjudication in part. As relevant to the present appeal, the court treated plaintiff's FEHA claim as four separate causes of action and ruled as follows:

(1) Disability discrimination/wrongful termination (§ 12940, subd. (a))—granted: “There is insufficient evidence that

² The complaint also alleged causes of action against Tavis Grim. The trial court granted summary adjudication of some of the claims against Grim, and granted a nonsuit as to the others. Neither party raises any issues as to these claims on appeal, and thus we do not discuss them further.

any of the actions taken against plaintiff were because of his brain tumor.”

(2) Failure to accommodate (§ 12940, subd. (m)(1))—granted: “Plaintiff does not appear to have requested any accommodation; nor to have had accommodation denied.”

(3) Failure to engage in interactive process (§ 12940, subd. (n))—denied: “There are triable issues of fact as to whether defendant failed to engage in a proper interactive process.”

(4) Retaliation (§ 12940, subd. (h))—denied: “Plaintiff provides evidence that he bore witness against Grim, twice, and that he was later terminated for what seems to be a random reason. Inferences can be raised about whether plaintiff’s statements were the reason for his termination.”

(5) Intentional infliction of emotional distress—denied.

(6) Punitive damages—granted: “Plaintiff failed to provide clear and convincing evidence of punitive conduct.”³

G. Trial

Plaintiff’s remaining claims went to trial before a jury. On June 17, 2016, the jury returned a verdict for plaintiff and awarded damages as follows:

Retaliation/wrongful termination:

Economic damages: \$195,193

Non-economic damages: \$167,000

Failure to engage in the interactive process:

³ The court also granted summary adjudication of plaintiff’s claims for invasion of privacy, defamation, and failure to provide time records, and denied summary adjudication of plaintiff’s claims under the CFRA and for failure to pay accrued vacation pay. Neither party asserts error as to these rulings, and thus we do not address them further.

Past economic damages (including medical costs): \$0
Future economic damages: \$502,131
Future medical expenses: \$43,200
Past noneconomic losses: \$83,500
Future noneconomic losses: \$83,500
Intentional infliction of emotional distress:
Economic damages: \$0
Noneconomic damages: \$167,000⁴

The trial court entered a judgment on special verdict on August 12, 2016. Thereafter, Albertson's moved for judgment notwithstanding the verdict and for a new trial; the trial court denied both motions. Plaintiff and defendant both timely appealed from the judgment.

H. Attorney Fee Award

On March 23, 2017, the trial court entered an order awarding plaintiff attorney fees of \$695,000, expert fees and costs of \$110,000, and statutory costs of \$38,333, for a total of \$843,333. Albertson's timely appealed from the award of attorney fees and costs.

PLAINTIFF'S APPEAL

Plaintiff's appeal challenges the grant of summary adjudication of his claims for disability discrimination (§ 12940, subd. (a)) and failure to accommodate (§ 12940, subd. (m)(1)). Plaintiff also contends the trial court erred in granting summary adjudication of his claim for punitive damages.

⁴ The jury returned a verdict for Albertson's on the CFRA claim, and for plaintiff on the claim for failure to pay accrued vacation pay. Neither party challenges these verdicts.

“Our standard of review is well settled. Under Code of Civil Procedure section 437c, a motion for summary judgment or summary adjudication shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. On appeal from an order granting summary adjudication, we exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff’s theories and establishing that the action was without merit.)” (*Fisherman’s Wharf Bay Cruise Corp. v. Superior Court of San Francisco* (2003) 114 Cal.App.4th 309, 320.)

I.

The Trial Court Erred by Granting Summary Adjudication of Plaintiff’s Disability Discrimination Claim

A. *Governing Law*

FEHA prohibits an employer from, among other things, discharging a person from employment because of a medical condition or physical disability. (§ 12940, subd. (a).) The express purposes of FEHA are “to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons.” (§ 12920.5.) “Because the FEHA is remedial legislation, which declares ‘[t]he opportunity to seek, obtain and hold employment without discrimination’ to be a civil right [citation], and expresses a legislative policy that it is necessary to protect and safeguard that right [citation], the court must construe the FEHA broadly, not . . . restrictively.” (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 243.)

A prima facie case of disability discrimination under FEHA requires a showing that the plaintiff (1) suffered from a medical condition or physical disability, (2) was able to perform the essential functions of his job, with or without reasonable accommodation, and (3) was subjected to adverse employment action because of the disability—that is, the disability was a substantial factor motivating the employer’s adverse action. (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1037 (*Castro-Ramirez*); *Green v. State of California* (2007) 42 Cal.4th 254, 262.) Once the plaintiff establishes a prima facie case, “the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action.” (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.) The plaintiff may then show the employer’s proffered reason is pretextual or offer any further evidence of discriminatory motive. (*Castro-Ramirez*, at p. 1037.) “‘In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias.’” (*Ibid.*)

It is undisputed that plaintiff was able to perform all the essential functions of his job, and that he suffered an adverse employment action. We therefore consider whether there were triable issues of fact as to whether plaintiff had a physical disability and whether Albertson’s terminated him because of his disability.

B. Triable Issues of Fact Exist as to Whether Plaintiff Had a Physical Disability Under FEHA

A person is physically disabled within the meaning of FEHA if he or she has, or has had, a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss

that *both* (1) affects a major body system (neurological, immunological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, skin, or endocrine), *and* (2) limits a major life activity. (§ 12926, subd. (m)(1).)

“Major life activities” include, among other things, caring for oneself, performing manual tasks, concentrating, thinking, interacting with others, and working. (Cal. Code Regs., tit. 2, § 11065, subd. (l)(1); hereafter, subd. (l)(1).) As relevant here, major life activities also include the operation of major bodily functions, including the functions of the neurological, brain, and endocrine systems, the operations of individual organs within body systems, and “normal cell growth.” (Cal. Code Regs., tit. 2, § 11065, subd. (l)(2); hereafter, subd. (l)(2).)

In *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 586-587 (*Soria*), the Court of Appeal held that a stomach tumor constituted a physical disability within the meaning of FEHA because it was a physiological disorder or condition that affected a major life system and “limited normal cell growth.” The court in *Meinelt v. P.F. Chang’s China Bistro, Inc.* (S.D. Tex. 2011) 787 F.Supp.2d 643, 651-652 (*Meinelt*) similarly concluded, holding that evidence that plaintiff had a brain tumor created a triable issue as to whether plaintiff was disabled under the American’s With Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.).⁵

⁵ Albertson’s attempts to distinguish *Meinelt*, urging that the plaintiff in that case was held to be disabled not simply because he had a brain tumor, but because his tumor required a six to eight month absence from work. We do not agree. *Meinelt* noted that in 2008 Congress had broadened the federal ADA’s

As in *Soria* and *Meinelt*, plaintiff in the present case presented evidence that he had a disorder or condition affecting a major body system within the meaning of section 12926, subdivision (m)(1)—namely, a benign tumor on his pituitary gland. Plaintiff also presented some evidence that the tumor affected his brain functions, including those associated with balance and memory, and his endocrine functions, including the production of testosterone. Accordingly, there was a triable issue of fact regarding whether plaintiff suffered from a physical disability within the meaning of FEHA.

Albertson’s urges that plaintiff’s tumor was not a disability within the meaning of FEHA because it did not prevent plaintiff from performing his job duties or caring for himself. We agree with Albertson’s on the facts, but not on the law. FEHA is designed *both* to ensure employment opportunities for disabled persons who are otherwise qualified for a job, but as a result of a disability are unable to perform the job’s essential functions without reasonable accommodations, *and* to prohibit discrimination against employees whose disabilities have no bearing on their ability to perform a given job. (*Brumfield v. City of Chicago* (7th Cir. 2013) 735 F.3d 619, 632 [discussing ADA]; see also *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 115 [“California’s statutory scheme protects employees from

definition of “major life activity” to include “the operation of a major bodily function, including, but not limited to, . . . normal cell growth . . . [and] brain . . . functions.” Thus, the court said, evidence that Meinelt “had a brain tumor—an abnormal cell growth—that would require brain surgery” raised a triable issue as to whether plaintiff was disabled. (*Meinelt, supra*, 787 F.Supp.2d at p. 651.)

an employer's erroneous or mistaken beliefs about the employee's physical condition. [Citation.] In short, the Legislature decided that the financial consequences of an employer's mistaken belief that an employee is unable to safely perform a job's essential functions should be borne by the employer, not the employee"]; *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 (*Gelfo*) ["By delineating the protections afforded in section 12926 to persons 'regarded as' disabled, the Legislature intended 'to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.' (§ 12926.1, subd. (d))"]. Accordingly, as we discuss below, an employee's ability to perform his job duties without accommodation is a defense to a failure to accommodate claim, but it is *not* a defense to a disability discrimination claim.

C. Triable Issues of Fact Exist as to Whether Plaintiff Was Terminated Because of His Physical Disability

In addition to establishing the presence of a disability, a plaintiff asserting disability discrimination must prove that his employer acted with discriminatory intent—that is, the plaintiff suffered an adverse employment action *because of* his disability. (E.g., *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215 (*Harris*) ["The phrase 'because of' means there must be a causal link between the employer's consideration of a protected characteristic and the action taken by the employer."]; *Soria, supra*, 5 Cal.App.5th at p. 590 [plaintiff must demonstrate " 'discrimination was a *substantial* motivating factor, rather than simply a motivating factor' "]; *Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1379 [plaintiff's claim based on a disparate treatment theory "requires a showing

that the employer acted with discriminatory intent”].) “To ‘more effectively ensure[] that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision,’ a plaintiff must demonstrate ‘discrimination was a *substantial* motivating factor, rather than simply a motivating factor.’” (*Soria, supra*, at p. 590.)

“Because a plaintiff does not often possess or obtain direct evidence that an illegitimate criterion was a substantial factor in a particular employment decision, California has adopted the three-stage burden shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, [36 L.Ed.2d 668, 93 S.Ct. 1817]. (*Guz [v. Bechtel National, Inc.* (2000)] 24 Cal.4th [317,] 354–356.) ‘This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.’” (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234.)⁶

⁶ Of course, “ ‘the *McDonnell Douglas* test was originally developed for use at trial [citation], not in summary judgment proceedings.” ’” (*Moore, supra*, 248 Cal.App.4th at p. 236.) In a summary judgment proceeding, “ ‘[i]f the employer presents admissible evidence either that one or more of plaintiff’s prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant’s showing. In short, by applying *McDonnell Douglas*’s shifting burdens of production in the

“Generally in cases involving affirmative adverse employment actions, pretext may be demonstrated by showing ‘ “the proffered reason had no basis in fact, the proffered reason did not actually motivate the discharge, or, the proffered reason was insufficient to motivate discharge.” ’ (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224; see also *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005, [pretext may be shown by ‘ “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them ‘unworthy of credence,’ [citation], and hence infer ‘that the employer did not act for [the asserted] non-discriminatory reasons’ ” ’]; *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 715 [court may ‘take [into] account . . . manifest weaknesses in the cited reasons [for termination] in considering whether those reasons constituted the real motive for the employer’s actions, or have instead been asserted to mask a more sinister reality’].)” (*Soria, supra*, 5 Cal.App.5th at p. 594.)

In the present case, Albertson’s offered a legitimate, nondiscriminatory reason for plaintiff’s termination: that plaintiff took three vendor crates home without permission. In response, plaintiff did not present any direct evidence of discrimination. However, plaintiff’s circumstantial evidence was sufficient to permit a reasonable inference that Albertson’s asserted reason was pretextual. That evidence included:

context of a motion for summary judgment, “the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury.” ’ ’ ’ ’ ” (*Ibid*, italics omitted.)

—Plaintiff believed his manager had instructed him to take down the Shock Top display and throw away the wood crates.

—Plaintiff reasonably believed the Shock Top crates had little or no value.

—Plaintiff removed the crates through the front door, in plain sight of the store’s security cameras.

—When a loss prevention employee asked about the crates, plaintiff said he had been instructed to take down the beer display and throw the crates away.

—There was no evidence Albertson’s had a policy of terminating employees who took display items they had been instructed to throw away.

—Albertson’s did not conduct a thorough investigation of the circumstances under which plaintiff took the Shock Top crates; specifically, the individuals investigating the incident never asked Grim whether he had instructed plaintiff to “dump” (throw away) the crates.

—Carol Hansen, who recommended that plaintiff be terminated, could not identify any other Albertson’s employee who had been terminated for taking something he had been told to put in the trash. She was aware that plaintiff had a pituitary tumor.

Based on this evidence, a factfinder could conclude that Albertson’s proffered reason for terminating plaintiff was unworthy of credence because no rational employer would terminate a well-regarded, 33-year employee for taking home three used wood crates—particularly under the circumstances present here, where plaintiff believed he had been told to throw the crates away, and upon being questioned about them,

immediately offered to return or pay for them. That is, although Albertson's had the *right* to terminate plaintiff for any non-discriminatory reason, even a trivial one, a trier of fact reasonably could conclude that the proffered reason was "‘unworthy of credence,’ [citation], and hence infer ‘that the employer did not act for [the asserted] non-discriminatory reasons.’" (*Soria, supra*, 5 Cal.App.5th at p. 594.) We therefore conclude that the trial court erred in granting summary adjudication of plaintiff's cause of action for disability discrimination.

II.

The Trial Court Properly Granted Summary Adjudication of Plaintiff's Claim for Failure to Reasonably Accommodate

A. Applicable Law

FEHA prohibits several employment practices relating to physical disabilities. First, as we have said, it prohibits employers from discharging or otherwise discriminating against an employee because of a physical disability unless the employee, "because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations." (§ 12940, subd. (a)(1).) Second, it requires employers to make "reasonable accommodation for the known physical or mental disability" of an employee. (*Id.*, subd. (m)(1).) Third, it requires employers to "to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation." (*Id.*, subd. (n).)

"Reasonable accommodation" is undefined by the statute, but has been defined by cases to mean "a modification or

adjustment to the workplace that enables the employee to perform the essential functions of” his or her job. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 974, (*Nadaf-Rahrov*); *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373 (*Nealy*).) “Interactive process” is also undefined in the statute, but has been described as “ ‘ “the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an “undue burden” on employers.” ’ [Citation.] ‘[T]he focus of the interactive process centers on employee-employer relationships so that capable employees can remain employed if their medical problems can be accommodated’ [¶] In sum, when an employer needs to fill a position and an applicant or employee desires the position, the interactive process is designed to bring the two parties together to speak freely and to determine whether a reasonable, mutually satisfactory accommodation is possible to meet their respective needs.)” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61–62 (*Gelfo*).)

“ ‘ “Essential functions” [are] the fundamental job duties of the employment position the individual with a disability holds or desires.” ’ . . . ‘A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following: [¶] (A) . . . [T]he reason the position exists is to perform that function. [¶] (B) . . . [T]he limited number of employees available among whom the performance of that job function can be distributed. [¶] [And] (C) . . . the incumbent in the position is hired for his or her expertise or ability to perform the particular [highly specialized] function.’ (Gov. Code, § 12926, subd. (f)(1); see Cal. Code. Regs., tit. 2, § 11065, subd. (e)(1).)”

(*Nealy, supra*, 234 Cal.App.4th at p. 373.) Essential functions “ ‘ do[] not include the marginal functions of the position’ ”—that is, those functions that “ ‘if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.’ ” (*Ibid.*)

The federal courts have held that an employer need not accommodate a disability that is irrelevant to an employee’s ability to perform the essential functions of her job, “not because such an accommodation might be unreasonable, but because the employee is fully qualified for the job without accommodation and therefore is not entitled to an accommodation in the first place.” (*Brumfield, supra*, 735 F.3d 619, 632 (*Brumfield*).) As a federal court has explained with regard to the ADA: “A disabled employee who is capable of performing the essential functions of a job in spite of her physical or mental limitations is qualified for the job, and the ADA prevents the employer from discriminating against her on the basis of her irrelevant disability. But since the employee’s limitations do not affect her ability to perform those essential functions, *the employer’s duty to accommodate is not implicated.*” (*Brumfield*, at p. 633, italics added; see also *Willis v. Conopco, Inc.* (11th Cir. 1997) 108 F.3d 282, 285 [goal of interactive process is “remedial in nature—ensuring that those with disabilities can fully participate in all aspects of society, including the workplace”].)

In *Brumfield, supra*, 735 F.3d 619, the court applied this analysis to conclude that a disabled employee had not demonstrated her right to an accommodation because she did not suggest that her disability affected her ability to do her job. The court explained: “The ADA is designed to prohibit discrimination

against employees whose disabilities have no bearing on their ability to perform a given job, but also to ensure employment opportunities for ‘disabled persons who are otherwise qualified for a job, but as a result of a disability are unable [to] perform the job’s essential functions without reasonable accommodations.’ [Citations.] The ADA accomplishes the latter goal by providing that an employer engages in unlawful disability discrimination when it fails to provide reasonable accommodations for ‘the known physical or mental limitations of an otherwise qualified individual.’ 42 U.S.C. § 12112(b)(5)(A). But it is important to recognize that the statute requires reasonable accommodation *only* in this situation. Whereas the ADA’s other antidiscrimination provisions protect *all* qualified individuals, the reasonable-accommodation requirement applies only to the known physical or mental limitations of *otherwise* qualified individuals.” (*Id.* at p. 632.) The court concluded that because plaintiff did not allege that her disability affected her ability to do her job, her claim failed. (*Id.* at pp. 633-634; see also *Hooper v. Proctor Health Care Inc.* (7th Cir. 2015) 804 F.3d 846, 852 [plaintiff could not establish a failure to accommodate claim because he was qualified for his position without accommodations].)

The principle explained in *Brumfield* applies equally to accommodation claims under FEHA.⁷ As California courts have noted, our Legislature “modeled section 12940(m) on the federal reasonable accommodation requirement.” (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 977.) Accordingly, California courts

⁷ In so concluding, we have considered the parties’ post-argument supplemental briefs.

interpreting FEHA frequently look to federal decisions interpreting the ADA. (See, e.g., *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at pp. 1046-1047; *Rope*, *supra*, 220 Cal.App.4th at pp. 653-654; *Nadaf-Rahrov*, at p. 979-980.) Further, and of particular relevance to the present issue, our Supreme Court has held that the reasonable accommodation requirements of the ADA and FEHA are functionally the same, holding that “the FEHA and the ADA both limit their protective scope to those employees with a disability who can perform the essential duties of the employment position with reasonable accommodation.” (*Green v. State of California*, *supra*, 42 Cal.4th at p. 264; see also *Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 974 [because the California Legislature modeled the reasonable accommodation requirement of section 12940, subdivision (m) on the parallel federal requirement, “ ‘reasonable accommodation’ in the FEHA means (as relevant here) a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired”].) We therefore conclude that, as under the ADA, FEHA requires employers to offer accommodations to a disabled employee only if the employee requires such accommodations to perform the essential functions of his job.⁸

⁸ Plaintiff urges we should not apply *Brumfield*’s analysis to FEHA because “[a]n employer’s duty to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA.” In support, he cites *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 361, which held that unlike the federal ADA, FEHA requires employers to reasonably accommodate *all* disabled employees—even those who will not be able to perform the essential job functions with reasonable accommodation. We are not

*B. Plaintiff Did Not Raise a Triable Issue That He
Required an Accommodation to Perform His Essential
Job Functions*

Having clarified the law, we now turn to the facts as presented in support of and opposition to summary judgment. The undisputed evidence before the trial court on summary judgment established that plaintiff could perform all of his essential job functions without employer-provided accommodations. Specifically, in his declaration in opposition to Albertson's motion for summary judgment, plaintiff stated that he was able to perform all the essential functions of his job by self-accommodating—that is, by “keep[ing] constant notes about instructions given to me” and “us[ing] extra care and mov[ing] more slowly due to balance issues and motor skill difficulties.” Plaintiff's deposition testimony was similar: Plaintiff asserted that his self-accommodations allowed him to perform his job without “any difficulties.” And plaintiff's store manager, Randy Johnson, similarly declared that he was not aware of any way in which plaintiff's pituitary tumor limited plaintiff's ability to perform his job.

In the absence of evidence that an employee required an accommodation to perform his essential job functions, there can be no employer liability for failure to accommodate. The trial court therefore properly granted summary adjudication of plaintiff's section 12940, subdivision (m)(1) cause of action.

persuaded: As we have said, the California Supreme Court subsequently held to the contrary in *Green v. State of California*, *supra*, 42 Cal.4th at p. 264.

III.
The Trial Court Properly Granted
Summary Adjudication of Plaintiff's Claim
For Punitive Damages

Plaintiff contends the trial court erred in granting summary adjudication of his punitive damages claim. For the reasons that follow, we disagree and affirm.

A. Legal Standards

Punitive damages generally may be awarded in a civil action only if the plaintiff proves by clear and convincing evidence that “the defendant has been guilty of oppression, fraud, or malice” (Civ. Code, § 3294, subd. (a).) “Malice” means conduct that “is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (*Id.*, § 3294, subd. (c)(1).) “Oppression” means “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” (*Id.*, § 3294, subd. (c)(2).) And “fraud” means “intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.” (*Id.*, § 3294, subd. (c)(3).)

Because corporations “are legal entities which do not have minds capable of recklessness, wickedness, or intent to injure or deceive,” an award of punitive damages against a corporation necessarily rests “on the malice of the corporation’s employees.” (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167.) But the law “does not impute every employee’s malice to the corporation.” (*Ibid.*) Instead, the punitive damages statute requires proof of

malice, oppression, or fraud “on the part of an *officer, director, or managing agent* of the corporation.” (Civ. Code, § 3294, subd. (b), *italics added.*)

Our Supreme Court has said that to determine whether an employee is a “managing agent,” it is not enough that the supervisor has “ ‘immediate and direct control over [the plaintiff],’ ” “ ‘responsibility for supervising [his] performance,’ ” and the “ ‘authority to terminate [him].’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574 (*White*).) Instead, “ ‘the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Ibid.*) Thus, “principal liability for punitive damages does not depend on employees’ managerial level, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy. . . . [S]upervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation could be managing agents. Conversely, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under [Civil Code] section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation’s business.” (*Id.* at pp. 576–577.)

B. Analysis

Each of the three employees who participated in the decision to terminate plaintiff submitted a declaration describing his or her job responsibilities and role in setting corporate policy.

As relevant here, each employee stated that he or she did not establish or draft corporate policy for Albertson's:

Tavis Grim, plaintiff's immediate supervisor, stated that he was not a member of store management and did not establish corporate policy at Albertson's. Instead, he was a non-exempt employee and "follow[ed] . . . corporate policy" in the store in which he worked.

Carol Hansen, the associate relations representative who recommended plaintiff's termination, stated that she did not establish or draft corporate policy for Albertson's, but rather "review[ed] corporate policies and [was] familiar with them so that I [could] inform Albertson's employees about what the corporate policies are if they contact[ed] me When I am involved in discussions with a management employee about potential discipline of Albertson's employees, I talk to the manager about what the corporate policies are and what the past practice has been. I do not, however, decide on what the discipline will be, or whether to terminate employment, but I do provide recommendations based on what Albertson's past practice has been in similar situations."

Randy Johnson, plaintiff's store manager, stated that he made the decision to terminate plaintiff. With regard to his role in the corporate hierarchy, Johnson said he did "not determine Albertson's corporate policy. Instead, corporate policy is provided to me from company headquarters, and I merely apply Albertson's corporate policy to the operations within my particular store."

On appeal, plaintiff contends that Johnson was a managing agent because he "set policy at his store." However, plaintiff's only evidence of Johnson's asserted policy-making role was that

Johnson had discretion to give away vendor display items and to hand out “high five” awards without obtaining permission from his supervisor. Under *White*, this evidence is plainly insufficient to establish that Johnson was engaged in corporate policymaking. Thus, plaintiff did not establish a triable issue of fact as to whether Johnson was a “managing agent” within the meaning of Civil Code section 3294. (See *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421-422 [evidence that supervisor had “immediate and direct control over [plaintiff] with the responsibility for supervising her performance” did not establish that supervisor was a managing agent].)

Plaintiff similarly failed to show a triable issue as to whether Hansen was a managing agent. Although there was evidence that Hansen was responsible for employee relations at 60 stores, plaintiff did not establish that Hansen played any role in setting corporate policy. At best, plaintiff raised a triable issue regarding whether Hansen decided plaintiff’s termination was required by Albertson’s policy—not that she created that policy.

Finally, plaintiff does not contend on appeal that Grim was a managing agent for punitive damages purposes.

For all of these reasons, the trial court properly granted summary adjudication of plaintiff’s punitive damages claim.

ALBERTSON’S APPEAL

Albertson’s challenges the verdict with respect to the causes of action for failure to engage in the interactive process, retaliation, and intentional infliction of emotional distress. Separately, Albertson’s challenges the trial court’s award of attorney fees.

“[F]actual findings made by the trier of fact are generally reviewed for substantial evidence.” (*Ermoian v. Desert Hospital*

(2007) 152 Cal.App.4th 475, 500-501.) Under this standard, we consider “whether a reasonable trier of fact could have found for the respondent based on the entire record.” (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1282–1283.) We review de novo issues of law, including assertions of instructional error. (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452; *Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 156; *Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1000.)

I.

Interactive Process Verdict

Albertson’s contends that plaintiff’s interactive process claim fails because (1) it was undisputed that plaintiff could perform all the essential functions of his job without reasonable accommodation, and (2) plaintiff has never identified a reasonable accommodation he should have been provided, but was denied. Plaintiff disagrees, urging that the need for an accommodation is not an element of an interactive process claim; and, in any event, there was substantial evidence that he had a disability that required reasonable accommodation.

As we discuss, the need for an accommodation is an element of an interactive process claim, and there was no substantial evidence in this case that plaintiff required an accommodation to perform the essential functions of his job. Further, plaintiff has not identified an accommodation Albertson’s was legally required to, but did not, provide. We therefore reverse the interactive process verdict and direct the trial court to enter judgment for Albertson’s on the interactive process cause of action.

A. *Plaintiff Did Not Prove by Substantial Evidence That He Required an Accommodation to Perform His Essential Job Functions*

As we have said, a FEHA plaintiff cannot prevail on a reasonable accommodation claim if he can perform all of his essential job functions without accommodation. The same is true of a claim under section 12940, subdivision (n) for failure to engage in the interactive process: Because a reasonable accommodation is “a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired,” an employer’s duty to engage in an interactive process “extends only to accommodations that would enable the employee to perform the essential functions of the position.” (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 974-975; *Nealy*, 234 Cal.App.4th at p. 373; see also Cal. Code Regs., tit. 2, § 11069 [“When needed to identify or implement an effective, reasonable accommodation for an employee or applicant with a disability, the FEHA requires a timely, good faith, interactive process between an employer or other covered entity and an applicant, employee, or the individual’s representative, with a known physical or mental disability or medical condition.”].)

In the present case, plaintiff’s testimony was that he was an excellent produce clerk and acting produce manager. On appeal, plaintiff describes the evidence of his job performance this way: “For . . . 33 years, Rubalcaba was a loyal, hardworking, and exemplary produce clerk at Albertson’s [He] had an amazing relationship with the customers, placed great emphasis on setting up creative and festive produce displays, and spent a great deal of time ensuring that the produce in the department was nicely presented and ready for customers . . . In fact,

Rubalcaba's performance was so exemplary at Albertson's that there was no contrary evidence presented at trial."

This summary is supported by the trial testimony. Plaintiff testified that he was the acting produce manager in the Moreno Valley store from November 2010 to November 2011, during which time district manager Steve Fujimoto told him he was doing an "outstanding job," and store manager Jim Moore said he could not have done a better job than he did. In November 2011, plaintiff was asked to be the acting produce manager in the Riverside store, which was the second busiest store in the district. During the four months plaintiff served in that position, he said he did not receive any criticisms, and instead "received a lot of compliments" for the "great job" he was doing. And in June 2013, plaintiff filled in for Tavis Grim as acting produce manager; store manager Randy Johnson gave him a "high five" award for his performance and told plaintiff that "he was real happy with" him.

Albertson's witnesses similarly testified that plaintiff was an excellent employee who performed his job well without any accommodations. Plaintiff's immediate supervisor, Tavis Grim, described plaintiff as a "very good" employee who worked hard and was trustworthy. Grim said that during the three or four years he and plaintiff worked together, he never observed plaintiff to have any balance or memory issues, or to have difficulty with the physical or nonphysical aspects of his job, which included writing orders, breaking down loads, lifting produce boxes, and stocking the shelves. Assistant store manager Ron McInturf similarly testified that plaintiff was a good employee who "seemed very bright and on top of things."

And store manager Randy Johnson testified that he never saw plaintiff exhibit any problems with his work performance.

Notwithstanding this testimony, plaintiff contends that there was evidence that the tumor affected his memory, balance, and motor coordination. He is correct only in part. Plaintiff did testify that he had difficulties with memory and balance, which he attributed to his tumor. However, he specifically testified that these difficulties did *not* interfere with his ability to do his job:

“Q: Up to the termination of your employment, did you have any difficulties performing your job because of your brain tumor?

“A: No, ma’am.

“Q: Prior to the termination of your employment, . . . did you have any difficulties caring for yourself?

“A: No, ma’am. . . . [¶] . . . [¶]

“Q: And [the feeling of being off balance] didn’t impact your job in any way, right?

“A: No, ma’am.”

We do not suggest that plaintiff’s pituitary tumor was asymptomatic or did not have an effect on plaintiff’s life. Plaintiff’s testimony that his tumor affected his balance and memory is, under our standard of review, dispositive on this issue. But for purposes of reviewing the sufficiency of the evidence to support the interactive process verdict, the relevant question is not whether the tumor had *any* effect on plaintiff, but rather whether it limited his ability to perform the essential functions of his job without reasonable accommodation. Because there is no substantial evidence the tumor had such an effect, Albertson’s was not required by FEHA to provide plaintiff with an accommodation.

Citing *Gelfo*, *supra*, 140 Cal.App.4th 34, plaintiff asserts that an employer is required to accommodate not only employees who are *actually* disabled, but also those whom the employer “regards as” disabled. We do not disagree with this principle, but we conclude it has no application to the present case. In *Gelfo*, it was undisputed that the employer regarded the plaintiff as disabled; as the *Gelfo* court noted, the employer expressly withdrew its job offer to the plaintiff because it believed “medical restrictions imposed as a result of [plaintiff’s] lower back injury rendered him unable to perform the essential functions of the job.” (*Id.* at pp. 47, 48-49.) Under these circumstances, the court held that the employer was required to have attempted to accommodate the physical limitations it believed the plaintiff to have. (*Id.* at p. 60.) *Gelfo*’s analysis simply has no application to the present case, where, as we have described, there was no evidence that Albertson’s believed plaintiff was unable to perform the essential functions of his job. Accordingly, Albertson’s cannot be liable for failure to engage in the interactive process.

B. Plaintiff Has Never Identified a Reasonable Accommodation He Was Improperly Denied

There is a second, independent reason why the trial record does not support the interactive process verdict—namely, that plaintiff has never identified a reasonable accommodation he was improperly denied. To prevail on a claim for failure to engage in the interactive process, “the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred [or should have occurred].” (*Nealy*, *supra*, 234 Cal.App.4th at p. 379; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018 (*Scotch*); *Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at p. 984.) “An employee cannot

necessarily be expected to identify and request all possible accommodations during the interactive process itself because “ “[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . .” ’ [Citation.] However, . . . once the parties have engaged in the litigation process, to prevail, *the employee must be able to identify an available accommodation the interactive process should have produced.*” (*Scotch*, at p. 1018, italics added; see also *Nealy*, at p. 379.)⁹

Plaintiff identifies only one “accommodation” he claims should have been offered to him: “[T]o take into account that when [plaintiff] said he did not remember touching Wolfe on the

⁹ Citing *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, plaintiff suggests that an available reasonable accommodation is not an element of an interactive process claim. But *Wysinger*’s holding is of questionable validity in view of subsequent Court of Appeal decisions that expressly hold to the contrary. (See *Nadaf-Rahrov*, *supra*, 166 Cal.App.4th at pp. 978-983 [disagreeing with *Wysinger*’s construction of section 12940, subdivision (n), and concluding that “the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim”]; *Scotch*, *supra*, 173 Cal.App.4th at p. 1018 [synthesizing *Wysinger* and *Nadaf-Rahrov* as follows: “To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred”]; *Nealy*, *supra*, 234 Cal.App.4th at p. 379 [adopting *Scotch*’s analysis].)

shoulder, he is not lying—he may just not be able to remember due to [his] brain tumor.” But as we have said, the duty to accommodate requires an employer to offer modifications or adjustments to the workplace “that enable[] the employee to perform *the essential functions of the job held or desired*.” (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 974, italics added.) Recalling the details of an interaction plaintiff had with an Albertson’s employee when he was *off-duty*, purchasing food to take on a weekend camping trip, can hardly be considered essential functions of *his job*. As such, it did not require a reasonable accommodation. (§ 12940, subd. (m)(1), (n).) Nor is there any evidence that Albertson’s failure to “accommodate” plaintiff in the way he suggests caused him to suffer any damages. The evidence at trial was that plaintiff was disciplined following the Wolfe incident for “inappropriate behavior”—that is, for “grabbing the associate’s [Wolfe’s] neck”—*not* for failing to recall the incident. Thus, even if Albertson’s had failed to accommodate plaintiff in the way he suggests, there is no evidence plaintiff suffered any harm as a result.

For all of these reasons, plaintiff’s claim for failure to engage in the interactive process fails for lack of substantial evidence.

C. *Because the Interactive Process Verdict Is Not Supported by Substantial Evidence, We Direct Entry of Judgment for Albertson’s on This Cause of Action*

When the plaintiff has had a full and fair opportunity to present his case and the evidence is insufficient as a matter of law, a judgment for defendant is required. (*Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1066, superseded by statute on other grounds; *Williamson v. Prida* (1999)

75 Cal.App.4th 1417, 1427; *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, § 14:147.2, pp. 14-49.) Accordingly, because we have concluded that plaintiff's evidence was insufficient as a matter of law to support the interactive process verdict, we direct the trial court to enter judgment for defendant on this cause of action.¹⁰

II.

Retaliation Verdict

Plaintiff asserted two separate retaliation theories at trial: namely, that he was fired for (1) requesting accommodation for his disability, and (2) for complaining about sexual harassment by Tavis Grim. The jury was instructed that *either* theory—requesting an accommodation *or* complaining about sexual harassment—could support a retaliation verdict. The jury returned a special verdict that did not distinguish between the two theories.

Albertson's challenges the retaliation verdict on several grounds. First, it contends the trial court erred in instructing the jury that requesting an accommodation was protected activity that could support a retaliation verdict. It urges the retaliation verdict therefore must be reversed because the jury was allowed to return a retaliation verdict on an unsupportable legal ground. Second, Albertson's contends there was no substantial evidence

¹⁰ Because we so conclude, we do not consider Albertson's claims that the trial court erred in permitting plaintiff's expert to testify, that there was no evidence plaintiff requested an accommodation, or that the damages awarded were excessive.

that plaintiff was fired in retaliation for complaining about sexual harassment by Grim.

Plaintiff appears to concede that the retaliation instruction was erroneous, but he asserts Albertson's invited the instructional error. Separately, plaintiff asserts that the retaliation verdict was supported by substantial evidence.

As we discuss, the trial court misinstructed the jury that requesting an accommodation could support a retaliation verdict, and Albertson's did not invite the error. Further, there was no substantial evidence that Albertson's retaliated against plaintiff for "oppos[ing]" sexual harassment by Grim. We therefore reverse the retaliation verdict and direct the trial court to enter judgment for Albertson's on the retaliation claim.

A. *Retaliation Based on Requesting Accommodation for Disability*

1. Background

(a) *Prior law*

When plaintiff was terminated in 2013, FEHA provided, in relevant part, that it was an unlawful employment practice for an employer to discharge or otherwise discriminate against an employee because he or she "*has opposed any practices forbidden under this part.*" (§ 12940, subd. (h), italics added.)

In *Rope v. Auto-Chlor System of Washington* (2013) 220 Cal.App.4th 635 (*Rope*), the court held that requesting an accommodation for a disability was not "protected activity" that would support a FEHA retaliation claim. The court explained: "[C]ase law and FEHA's implementing regulations are uniformly premised on the principle that the nature of activities protected by section 12940, subdivision (h) demonstrate some degree of *opposition to or protest of* the employer's conduct or practices

based on the employee’s reasonable belief that the employer’s action or practice is unlawful.” (*Id.* at pp. 652–653, italics added.) The court found “no support in the regulations or case law for the proposition that a mere request—or even repeated requests—for an accommodation, without more, constitutes a protected activity sufficient to support a claim for retaliation in violation of FEHA.” (*Id.* at p. 652.)

In 2015, the Legislature amended FEHA “to provide protection against retaliation when an individual makes a request for reasonable accommodation under these sections, regardless of whether the request was granted.” (Assem. Bill No. 987 (2015–2016 Reg. Sess.) § 1, subd. (d); hereafter, 2015 amendment.) As amended, effective January 1, 2016, section 12940, subdivision (m)(2) makes it unlawful for an employer to “retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.”

(b) *Retaliation instruction*

At the time of trial, no appellate court had considered whether the 2015 amendment applied retroactively. Albertson’s argued in the trial court that the 2015 amendment should *not* apply retroactively, and it submitted a proposed special jury instruction stating that “ ‘Protected activity’ for retaliation purposes does not include making requests for accommodation.” Plaintiff objected to the proposed special instruction, urging that “Assembly Bill 987 was a clarifying instruction, [and] as such it is applied retroactively.”

The trial court concluded that the 2015 amendment applied retroactively, and it asked the parties to submit an instruction reflecting its ruling. It then instructed the jury as follows:

“Plaintiff seeks to recover damages based upon a claim of unlawful employment retaliation.

“The essential elements of this claim are:

“1. Plaintiff was an employee of defendant.

“2. Plaintiff engaged in a legally protected activity, namely, protested sexual harassment in investigations against the Produce Manager Tavis Grim, *and/or requested an accommodation for a disability*;

“3. Defendant formed an intent to retaliate against plaintiff for engaging in the legally protected activity;

“4. Defendant retaliated by subjecting plaintiff to an adverse employment action;

“5. Plaintiff’s legally protected activity was a substantial motivating factor in producing the intent to retaliate and the retaliation; and

“6. Defendant’s retaliation and the adverse employment action caused plaintiff injury, damage, loss or harm. [¶] . . . [¶]

“An employee who requests an accommodation for a physical disability is engaging in a legally protected activity. It is unlawful for an employer to retaliate against an employee for so requesting, regardless of whether the request was granted.”
(Italics added.)

(c) Moore v. Regents: *2015 amendment held not to apply retroactively*

After the jury returned its verdict, the court in *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 245–246 (*Moore*) held that the 2015 amendment did *not* apply retroactively because it changed, rather than restated, prior

law.¹¹ The court noted that in adopting section 12940, subdivision (m)(2), the Legislature (1) did not include a statement that it was merely clarifying existing law, (2) said it intended “ ‘to *provide* protection against retaliation,’ ” which was an unnecessary statement if such protection already existed, and (3) did not amend the general retaliation provision (§ 12940, subd. (h)), but instead added language to the provision addressing reasonable accommodations for disabilities. (*Moore*, at p. 247, quoting Stats. 2015, ch. 122, § 1, subd. (d), italics added.) The court concluded: “We therefore presume that in passing Assembly Bill 987, the Legislature intended to *change* the law, not clarify it. *Thus, the amendment to section 12940 enacted through Assembly Bill 987 operates prospectively.*” (*Id.* at p. 247, italics added; see also *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 943-944 [adopting *Moore*’s analysis].)

2. The Retaliation Instruction Was Erroneous, and Albertson’s Did Not Invite the Error

Albertson’s contends the trial court erred in instructing the jury that a request for an accommodation could support a retaliation verdict, and the error requires reversal of the retaliation verdict. Plaintiff appears to concede the instructional error, but he urges Albertson’s invited it.

We conclude that the instruction was erroneous. Plaintiff does not address *Moore*, which Albertson’s cited in its brief, much less provide us with a reason not to follow it. For the reasons

¹¹ The jury returned its verdict in this case on June 17, 2016. The Court of Appeal filed *Moore* on June 2, 2016, but did not initially certify it for publication. The opinion was ordered published on June 20, 2016.

articulated in *Moore*, we agree that section 12940, subdivision (m)(2) does not apply to acts that occurred before it became effective on January 1, 2016, several years after plaintiff's termination. The trial court therefore erred in instructing the jury that a request for an accommodation constituted "protected activity" that would support a claim for retaliation under section 12940, subdivision (h).

Further, Albertson's did not invite the error by "expressly request[ing]" the erroneous instruction. As we have said, Albertson's specifically asked the court to instruct the jury that protected activity for retaliation purposes did not include making requests for accommodation. After briefing and argument on the issues, the court concluded that the 2015 amendment applied retroactively, and it asked attorneys for both sides to work on an appropriate jury instruction. Defendant's counsel responded: "Just so the record is clear, Your Honor, our position is the only thing that should be at issue here is the . . . alleged protected activity of not [retaliating] against an employee for protesting sexual harassment in the workplace, which was the agreed-upon portion of the language. [¶] *Even if we later agree to language which helps with the court's ruling, I just want the record to be clear we think that's improper per se.*" (Italics added.) The court responded: "Okay. All right." Only thereafter did Albertson's submit a proposed instruction stating that a request for accommodation could support a retaliation verdict.

"Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error. [Citations.] *But the doctrine does not apply when a party, while making the appropriate objections, acquiesces in a judicial*

determination. [Citation.] As [the Supreme Court] has explained: ‘“An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.” ’” (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212–213 (*Mary M.*)).

In the present case, Albertson’s did not invite the trial court to instruct the jury that a request for an accommodation could support a retaliation verdict. To the contrary, it took the opposite position throughout the case. Albertson’s therefore is not precluded from asserting instructional error. (See *Mary M.*, *supra*, 54 Cal.3d at p. 213.)

3. The Instructional Error Compels Reversal of the Retaliation Judgment

Albertson’s contends that the erroneous jury instruction requires reversal of the retaliation verdict. We agree. The challenged instruction told the jury it could return a retaliation verdict for plaintiff if it concluded Albertson’s had retaliated against plaintiff *either* for requesting an accommodation *or* for reporting sexual harassment by Tavis Grim. The jury’s verdict did not distinguish between the two retaliation theories, and thus we do not know whether its verdict was based on one theory or the other, or both.

Under these circumstances, reversal of the retaliation verdict is required. “Where two theories are presented to a jury, of which only one is supported by substantial evidence, and a general verdict is returned in favor of the plaintiff, it is presumed that the verdict was based on the theory that is supported by the evidence. But where the jury is permitted to choose between two

factual theories, is misinstructed as to the legal requisites for one of them, and there is no way to eliminate the likelihood that the jury chose the theory affected by the instructional error, ‘it is likely that the jury, following the instructions, reached an improper verdict.’ That is what happened in this case. Reversal is required.” (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 480.)

B. Retaliation Based on Protesting Sexual Harassment by Grim

Because there is no dispute that protesting sexual harassment is a protected activity under FEHA, we must remand for a new trial on retaliation unless we conclude that substantial evidence did not support plaintiff’s alternative retaliation theory—i.e., that plaintiff was terminated for complaining about sexual harassment by Grim. (See *Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 624 [reversal for insufficiency of the evidence concludes the litigation].) We turn now to this issue.

As we have said, FEHA makes it unlawful for an employer “to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under” FEHA. (§ 12940, subd. (h).) Albertson’s contends that there was no substantial evidence at trial that plaintiff was terminated for “opposing” sexual harassment by Grim. Specifically, Albertson’s says that although plaintiff participated in investigations of Grim initiated by other employees, he neither complained about Grim’s conduct nor suggested that he believed Grim had acted unlawfully.

A retaliation claim may be brought by an employee who has complained of or opposed conduct the employee reasonably

believed to be discriminatory, even when a court later determines the conduct was not actually prohibited by FEHA. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043.) However, “an employee’s *unarticulated belief* that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a *prima facie* case of retaliation, where there is no evidence the employer knew that the employee’s opposition was based upon a reasonable belief that the employer was engaging in discrimination.” (*Id.* at p. 1046, italics added.) Thus, while “‘an employee is not required to use legal terms or buzzwords when opposing discrimination,’” to be actionable, the employee’s communications to the employer must “‘sufficiently convey the employee’s reasonable concerns that the employer *has acted or is acting in an unlawful discriminatory manner.*’” (*Id.* at p. 1047, italics added.)

Division Seven of this court applied this standard in *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168 to conclude that an employee’s complaints to management—that the employer had not included an AIDS-related charity on its list of automatic payroll deductions, and that more work was required to be done on behalf of the employer’s LGBT employees—did not give rise to a FEHA retaliation claim. The court concluded: “Absent the identification of some more pointed criticism or opposition salient to an act reasonably believed to be prohibited by FEHA, [plaintiff] failed to raise a triable issue of fact supporting his claim of retaliation.” (*Id.* at p. 1194.)

Similarly, in *Alcala v. Best Buy Stores, LP* (C.D. Cal. 2012) 2012 WL 6138332, the court held that an employee’s “complaints about the unfair treatment he was receiving after returning from [medical] leave” did not give rise to a FEHA retaliation claim.

(*Id.* at *35.) The court explained: “[Plaintiff] provides no evidence that he aired his concerns in a manner that a reasonable jury could conclude put Defendant on notice that [plaintiff] believed his cut hours and cessation of supervisory training—the two issues [plaintiff] complained about—were due to unlawful discrimination rather than a personal grievance.” (*Id.* at *37.)

With this legal standard in mind, we now turn to the alleged protected conduct in the present case, considering whether there was substantial evidence that plaintiff communicated to management that he believed Grim had acted unlawfully.

Elisa Wilson incident. Plaintiff testified that in 2007, he was present when an employee, Elisa Wilson, complained to Grim about how much work she had to do, and Grim responded that she should “put her head down and just suck it up.” Wilson reported the incident, and management interviewed plaintiff about it. Plaintiff told management what he had heard—that Grim said to her to “put her head down and just suck it up”—but at trial he admitted that he neither complained about Grim’s conduct nor said he believed Grim had treated Wilson poorly. Because there thus is no evidence plaintiff communicated to Albertson’s that he believed Grim’s conduct was unlawful, plaintiff’s response to questions from management about this incident could not give rise to a retaliation claim.

Lorena Valdivia incident. Plaintiff also testified that in November 2012, he observed an incident between Grim and Lorena Valdivia. A few days later, store manager Kevin Smith and human resources employee Melissa Gonzalez interviewed plaintiff about the incident. Smith asked plaintiff what he saw

occur between Grim and Valdivia. Plaintiff said: “Lorena was walking out of the produce cooler, and she was carrying a bowl of cut watermelon. And Tavis [Grim] saw her coming out of the produce cooler and walked up on the side of her, where she didn’t see him coming. And he put his arm around her neck and pulled her head down and walked around with her in a circle, walking like this; walking, walking. And she was just, like, trying to get out of it, but she had her hands on that bowl.” Plaintiff did not tell management that he believed Grim’s behavior had been unlawful, however. To the contrary, plaintiff testified that he told Smith, “ ‘It didn’t seem to me, Kevin, like, he was being aggressive toward her. It just seemed like he was telling her, “Hey, good job,” and that was his way of doing it.’ ” Because there thus is, again, no evidence plaintiff communicated to Albertson’s that he believed Grim’s conduct was unlawful, we conclude that the Valdivia incident cannot support a retaliation claim. (See *Husman, supra*, 12 Cal.App.5th at pp. 1193-1194.)

2013 produce clerk complaints. Plaintiff testified that in June 2013, three female produce clerks complained to him about Grim. The trial court sustained hearsay objections to counsel’s subsequent questions, and thus plaintiff did not testify about the subject of the clerks’ complaints. Plaintiff testified only that he relayed the unidentified complaints to the assistant store manager, who said “he had heard it’s been going on a lot;” and that plaintiff told his store manager, Randy Johnson, that he needed to talk to him about a complaint “the girls brought up to my attention about Tavis,” and Johnson said, “I’m aware of it and I know about it and I’m working on it.” Plaintiff never told Johnson what the subject of the complaints was, and he never heard any more about the issue. When he subsequently asked

Grim “if anybody had talked to him about anything that happened in our department,” Grim responded, “No. Nobody said anything to me.”

Although we believe that plaintiff’s testimony establishes that plaintiff complained to Albertson’s about *something*, we cannot discern what the subject of plaintiff’s complaint was. Plaintiff did not testify that the employees had complained about sexual harassment or any other conduct prohibited by FEHA; as the above-quoted testimony makes clear, plaintiff testified only that the complaints were “about Tavis” and that management was aware “of *it*.” Accordingly, a trier of fact could not reasonably have concluded that plaintiff complained about sexual harassment.

Plaintiff asserts that the jury could have inferred that his complaints concerned sexual harassment because all the complainants were female and Grim had engaged in sexual harassment in the past. We do not agree. Because the jury was not instructed on the elements of sexual harassment, it could not have concluded that Grim sexually harassed Wilson or Valdivia; and, in any event, the mere fact that the three complainants were female could not reasonably have supported an inference that the subject of their complaints was sexual harassment. (See *People v. Davis* (2013) 57 Cal.4th 353, 360 [a reasonable inference may not be based on mere suspicion, imagination, supposition, surmise, conjecture, or guesswork]; *People v. Waidla* (2000) 22 Cal.4th 690, 735 “‘[S]peculation is not evidence, less still substantial evidence.’”.)

For all of these reasons, we conclude there was not substantial evidence that plaintiff “opposed” sexual harassment

by Grim. (§ 12940, subd. (h).)¹² Accordingly, because we have concluded that plaintiff's evidence was insufficient as a matter of law to support the retaliation verdict, we direct the trial court to enter judgment for Albertson's on this cause of action.

III.

Intentional Infliction of Emotional Distress Verdict

Albertson's contends that plaintiff's IIED claim was barred by the exclusive remedy of workers' compensation. Plaintiff disagrees, urging that his IIED claim is based on violations of FEHA and, therefore, falls outside the compensation bargain because FEHA violations are not a normal risk of employment.

Workers' compensation ordinarily provides the exclusive remedy for an injury sustained by an employee in the course of employment and compensable under the workers' compensation law. (Lab. Code, §§ 3600, et seq.; *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 812–813 (*Vacanti*).) The workers' compensation exclusivity rule also encompasses any injury “‘collateral to or derivative of’” an injury compensable under the workers' compensation law. (*Vacanti*, p. 813.)

In *Shoemaker v. Myers* (1990) 52 Cal.3d 1, our Supreme Court considered whether the exclusive workers' compensation remedy barred various employment claims brought by a state employee who claimed he had been terminated in retaliation for reporting illegal practices by the Department of Health Services.

¹² Because we so conclude, we do not address Albertson's alternative claims of error—namely, that the trial court gave an erroneous “cat's paw” instruction, and there was no substantial evidence Grim was a significant participant in the decision to terminate plaintiff.

The court held that the plaintiff could proceed on his statutory claim for termination in violation of a whistleblower protection statute (§ 19683), but that plaintiff's IIED claim was barred by the exclusive workers' compensation remedy. The court explained: "To the extent plaintiff purports to allege any *distinct* cause of action, not dependent upon the violation of an express statute or violation of fundamental public policy . . . then plaintiff has alleged no more than . . . that the employer's conduct caused him to suffer personal injury resulting in physical disability. . . . Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions." (*Shoemaker*, at p. 25, italics added.)

The court's most recent discussion of the intersection between workers' compensation exclusivity and tort claims arising out of employment relationships was in *Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876 (*Miklosy*). There, two employees alleged they had been terminated for reporting issues with the safety and reliability of the nation's nuclear weapons stockpile. (*Id.* at p. 884.) Among other things, the employees asserted that they suffered severe emotional distress, giving rise to common law causes of action for IIED. (*Id.* at p. 902.) The court held plaintiffs' IIED claims were barred by the workers' compensation remedy, explaining: "Plaintiffs allege defendants engaged in 'outrageous conduct' that was intended to, and did, cause plaintiffs 'severe emotional distress,' giving rise to common law causes of action for intentional infliction of emotional distress. The alleged wrongful conduct, however, occurred at the worksite, in the normal course of the employer-employee relationship, and therefore workers'

compensation is plaintiffs' exclusive remedy for any injury that may have resulted." (*Ibid.*)

There is a split of authority among the Courts of Appeal concerning the application of *Shoemaker* and *Miklosy* where an employee alleges that the emotional distress on which his or her IIED claim is based was caused by an act in violation of FEHA. Several courts have held that IIED claims arising out of workplace misconduct violating FEHA are barred by the exclusive workers' compensation remedy. (See *Yau v. Allen* (2014) 229 Cal.App.4th 144, 161-162; *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 832-833; *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 366-369.) At least one court has disagreed, holding that "absent further guidance from our Supreme Court, we are unwilling to abandon the long-standing view that unlawful discrimination and retaliation in violation of FEHA falls outside the compensation bargain and therefore claims of intentional infliction of emotional distress based on such discrimination and retaliation are not subject to workers' compensation exclusivity." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 96-102.)

We need not address the disagreement between the courts because we conclude that plaintiff's IIED claim is based entirely on conduct that plaintiff alleged gave rise to his FEHA claims. Since we have already concluded that plaintiff's interactive process and retaliation/wrongful termination claims are not supported by substantial evidence, plaintiff's IIED claim necessarily fails. Accordingly, we direct the trial court to enter

judgment for Albertson's on the IIED claim. (See section I.C., *ante.*)¹³

IV.

Attorney Fees

The trial court awarded attorney fees to plaintiff as the prevailing party. In light of our conclusion that the judgment must be reversed, the trial court's award of attorney fees and costs to the plaintiff as the prevailing party must be reversed as well. (*Creative Ventures, LLC v. Jim Ward & Associates* (2011) 195 Cal.App.4th 1430, 1452; *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1437, fn. 75.)

DISPOSITION

As to plaintiff's appeal: Summary adjudication of the cause of action for disability discrimination (§ 12940, subd. (a)) is reversed. Summary adjudication of the cause of action for failure to accommodate (§ 12940, subd. (m)(1)) and the request for punitive damages (Civ. Code, § 3294) is affirmed.

As to Albertson's appeals: The judgment is reversed with respect to the causes of action for retaliation (§ 12940, subd. (h)), failure to engage in the interactive process (§ 12940, subd. (n)), and intentional infliction of emotional distress. The trial court is directed to enter judgment for Albertson's on these causes of action. The award of attorney fees and costs to plaintiff is

¹³ Because we so conclude, we do not address Albertson's alternative contention that there was insufficient evidence of outrageous conduct.

reversed with directions to the trial court to enter a new order denying plaintiff's request for attorney fees and costs.

Except as specified, the judgment is affirmed. Both parties shall bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.